No. 226

IN THE

Supreme Court of the United States

October Term, 1944

REPUBLIC AVIATION CORPORATION,
Petitioner,

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR REPUBLIC AVIATION CORPORATION

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Opinions Below

The opinion of the court below (R. 710-715) is reported in 142 F. 2d 193. The decision and order of the National Labor Relations Board (R. 673-679) is reported in 51 N. L. R. B. 1186.

Jurisdiction

The decree of the court below (R. 716-718) was entered on April 6, 1944. The petition for a writ of certiorari was filed on July 5, 1944, and was granted on October 9, 1944 (R. 718). The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code (28 U. S. C. § 347(a)), as

amended by the Act of February 13, 1925, and upon Section 10(e) and (f) of the National Labor Relations Act (29 U. S. C. § 160(e) and (f)).

Statute Involved

The pertinent provisions of the National Labor Relations Act are set out in Appendix A.

Questions Presented

1. Petitioner promulgated a rule prohibiting solicitation of any type in its factory or offices. The sole purpose of the rule was to promote employee efficiency and harmony, and it was enforced impartially without animus against unions, general or particular. The question is whether, under the circumstances, the Board erred in finding that petitioner violated Section 8(1) of the Act by applying the rule to prevent solicitation for union membership in its plant during the employees' non-working time, and that petitioner violated Section 8(1) and (3) of the Act by discharging an employee who violated the rule.

2. No union having been recognized at its plant, petitioner forbade its employees to wear union "shop steward" buttons while at work. The question is whether, under the circumstances, the Board erred in finding that petitioner violated Section 8(1) of the Act by adopting and enforcing this prohibition, and that petitioner violated Section 8(1) and (3) of the Act by discharging three employees who refused to comply with the prohibition.[1]

1. A further question in the case relates to the sufficiency of evidence to support the Board's finding that the activities of three supervisory employees violated Section 8(1) of the Act (R. 692). Since the court below expressly refrained from deciding it, this question is not presented here (R. 714).

Statement of the Case

1. The Facts

Petitioner, at its Babylon, Long Island, plant, is exclusively engaged in the manufacture of military aircraft (the P-47 Thunderbolt) for the United States Army Air Corps. (R. 12, 48). In the forepart of 1943, petitioner's working force was 70 or 80 times larger than in 1939; it had doubled since the summer of 1942 (R. 541). This growing concentration of well-paid employees inevitably attracted solicitation for a host of organizations and causes—many highly deserving, others of questionable or even fraudulent character (R. 45-47). The great number and endless variety of potential demands upon the employees' time and money is graphically revealed by the record (R. 42-45, 53-56, 58, 446-452, 461-462).

Confronted with this threat to efficiency and harmony in the plant, petitioner resolved to prevent personal harassment of the employees by solicitors for any purpose whatever (R. 45-47). Its rule

> Soliciting of any type cannot be permitted in the factory or offices

adopted some time prior to March 1941, was in that month published in a handbook given to all employees (Pet. Ex. 1; R. 38-39, 41).[2]

This rule was designed to eliminate the subjection of employees (usually in the presence of fellow-workers) to personal pressure and insistence that they contribute to, assist or join a particular cause or organization (R. 46-47), and its enforcement involved three basic principles: (1) no exception was made for any cause, no matter how meri-

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2. The publication of the rule antedated by more than a year and a half the commencement of union activity in the plant (R. 204-205).

torious[3] (R. 463-464, 544); (2) it was applied both to working and non-working time (R. 47); and (3) it did not bar full and free employee discussion of any subject, including unions and their affairs (R. 556, 560, 563). Faced with a great influx of new employees and frequent attempts to violate the rule (R. 47, 543-544), petitioner enforced it impartially in all cases to the best of its ability (R. 30-31, 36-38, 42-45, 48-49, 54-58, 63-64, 446-452, 460-463, 472-473, 498-500).

For some time prior to January 15, 1943, employee Sam Stone was engaged in soliciting memberships in International Union, United Automobile Aircraft & Agricultural Implement Workers of America, U. A. W.-C. I. O. (hereafter called U. A. W.) in petitioner's plant on his own time (R. 66, 276-278, 322-323). On January 15, his sectional supervisor noticed Stone distributing U. A. W. application cards during the lunch period (R. 283). The supervisor warned him that he was violating the solicitation rule and thus courting dismissal (R. 88-89, 284), but Stone, admitting that he knew the rule, insisted that he would continue to disobey it (R. 89-90). Stone persisted in soliciting for several days (R. 90, 289-291), and finally his supervisor—after consultation with and authorization from higher officials—discharged him on January 20 (R. 74, 288-291, 406-407).

On January 13, 1943, at a meeting of some 30 individuals (chiefly members of the U. A. W. "Republic Organizing Committee"), employees Stone, Katz, Bobrow, and Kahler were designated "shop stewards" (R. 66, 136, 183, 206-208, 247). At this time the U. A. W. had chartered no local at petitioner's plant, nor had it sought recognition as employee bargaining representative (R. 158, 555). All four employees already belonged to the Organizing Committee, and their functions as stewards differed in no discernible respect from their functions as committee members (R. 66, 102, 156-157, 204, 215-217, 246, 252-253).

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3. Petitioner felt that any deviation from strict impartiality would have made progressively more difficult the enforcement of the rule (R. 464, 544).

On January 14, Katz and Stone began wearing in the plant buttons bearing the legend "UAW-CIO STEWARD" (Bd. Ex. 15, R. 67, 103, 113). A steward button was also displayed about the same time by employee Rosenkrantz, who was admittedly not a steward, but "had been told to wear the button" (R. 154, 557). The appearance of these insignia was reported on January 15 to A. L. Kress, Assistant to the President[4], then absent from the plant (R. 551-552). Directing that no action be taken in his absence, Kress returned on January 19 to confer with other officials of petitioner and its counsel, John J. Ryan (R. 551-553). After careful study with counsel of the facts and the applicable law, petitioner concluded that it could not properly ignore or acquiesce in the wearing of the "steward" buttons, since the practice (1) was a misrepresentation of the wearers' true status in the plant, (2) might well be held to constitute illegal assistance to the U. A. W. as against rival unions, and (3) threatened interference with the operation of petitioner's established grievance procedure (R. 553-555).

Before taking action, however, Kress decided to ascertain the view-points of the employees involved (R. 555). Accordingly, on January 22, Kress and other officials held discussions with Rosenkrantz (R. 556-558) and with Katz[5] (R. 559-562), at which these employees were requested to remove their steward buttons, and the reasons for petitioner's position were fully explained. Kress made clear to Katz that petitioner's objection related solely to the steward button, and that the wearing of any other type of U. A. W. button was entirely permissible (R. 561-562). Rosenkrantz agreed to comply with petitioner's request (R. 558) but Katz merely offered to remove his button until

4. Kress was charged with the formulation and administration of petitioner's industrial relations policies (R. 540).

5. Stone had been discharged two days before for violation of the solicitation rule, *supra*, p. 4.

he had consulted with U. A. W. officials (R. 561). Although explicitly warned of the penalty therefor (R. 562), Katz resumed wearing his button on the following day, and was in consequence discharged (R. 123).

Thereafter, on January 25 and 26 respectively, Bobrow and Kahler commenced wearing steward buttons in the plant (R. 183, 237). On January 26, Kress and other officials conferred at length with these employees, explaining the reasons for petitioner's policy in even greater detail than before (R. 562-565). As in his talk with Katz, so here Kress emphasized the complete propriety of any type of union button other than the steward insigne (R. 213, 241, 563). Although warned that further wearing of the buttons would result in their dismissal (R. 198, 242), Bobrow and Kahler announced unequivocally that they would persist in their course, which they regarded as proper under the Act (R. 190-191, 198, 240-241). Both continued to wear the buttons and both were discharged later in the day for refusal to comply with petitioner's order (R. 198, 242).

2. The Board's Findings and Order

The Board found in effect that the solicitation rule had not been discriminatorily applied to Stone (R. 675), but that the promulgation of the rule and its enforcement against union solicitation outside of working time was "in the absence of special circumstances" *per se* a violation of Section 8(1) of the Act, and that the discharge of Stone was a violation of Section 8(3) of the Act (R. 674-675).

The Board also found in substance that petitioner's ban against steward buttons did not result from any animus against the U. A. W. (R. 676), but that enforcement of the ban did curtail "the right of employees to wear union insignia at work" as a "reasonable and legitimate form of union activity", and therefore violated Section 8(1) and (3) of the Act (R. 675-676).

The Board's order *inter alia* required reinstatement with back pay for Stone, Katz, Bobrow, and Kahler, and

the rescission of the solicitation rule "insofar as it prohibits union activity and solicitation on company property during the employee's own time" (R. 677-679).

Thereafter petitioner petitioned the court below to review and set aside the Board's order (R. 680-687). The Board answered, requesting enforcement of its order (R. 695-700). On March 22, 1944, the court below held, one judge dissenting in part, that the Board's order should be enforced (R. 710-714, 714-715), and on April 16, 1944 it entered a decree accordingly (R. 716-718).

3. Decision of the Court Below

The court recognized that the question of the solicitation rule came to it "stark and bare", uncomplicated by any anti-union animus (R. 710-711); and it found that the question comprised two parts: (1) of fact, as to the prejudice to the employer and the benefit to the employees in permitting union solicitation during non-working time, and conversely, the respective benefit and prejudice in forbidding it, and (2) of law, "whether the benefit shall prevail over the prejudice, or vice versa" (R. 712). Deeming it to be the Board's function to determine the fact part of the question, the court further held that, although the Board had made no specific findings as to the respective benefit and prejudice either in the case at bar or in other cases involving the question, the Board could nevertheless "draw upon its general acquaintance in dealing with such conditions", and in the absence of specific evidence adduced by the employer, decide both the fact and law parts of the question (R. 712-713). The court concluded that, since the Board's findings failed to separate clearly the fact and law questions, it could not review the Board's determination of the law question (R. 713).

With respect to the prohibition against the wearing of steward buttons, the court appears to have held the reasonableness of this prohibition to be a question wholly within the Board's province (R. 714).

Judge Swan, dissenting on the issue of the solicitation rule, held in effect that the burden was upon the Board to show why the rule was unreasonable as applied particularly to petitioner's plant, and that, since the Board had made no such findings, the rule should be held valid (R. 714-715).

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1. In failing to hold that petitioner's solicitation rule was valid, and that application of the rule to union solicitation in the plant during non-working time did not constitute a violation of the Act.

2. In holding that it was without power to review the Board's determination of the question of law as to the reasonableness of the solicitation rule.

3. In failing to hold that petitioner's prohibition of the wearing of union steward buttons in its plant was valid.

4. In holding, in effect, that it was without power to review the Board's determination of the question of law as to the reasonableness of the prohibition of the wearing of steward buttons.

SUMMARY OF ARGUMENT

I

A. A determination of the question whether petitioner could lawfully forbid union solicitation in its plant during non-working time requires a careful appraisal and balancing of the conflicting interests involved. The important public interest in efficient production—particularly of vital war materials in war time—and in the safety and welfare of employees, and the parallel interest of the employer, should be weighed against the public interest in employee self-organization for collective bargaining. The Board's general doctrine condemning employer rules against solicitation in non-working time has been evolved without any attempt to weigh these opposing interests. In the instant case there is no evidence as to the importance to employee self-organization of intra-plant solicitation, and the Board made no findings either on this subject or on the question of prejudice to petitioner's efficient production if such solicitation were permitted. In the absence of any proper basis in the record, the Board's general conclusion may not be justified upon the theory of judicial notice. The Board has plainly reached its conclusion without due administrative procedure.

B. A consideration of (1) the history of employee self-organization, (2) the trend in current collective bargaining agreements, (3) the Congressional purpose behind the Act, and (4) the relevant decisions of the National Labor Relations Board and the National War Labor Board, indicates that the privilege of intra-plant solicitation is not, in the ordinary case, of particular significance in the protection of employee rights. On the other hand the permitting of such solicitation is fraught with potential, if not actual, danger to efficient production and employee safety. A

proper balancing of the conflicting interests justifies the prohibition of soliciting inside the plant in the absence of a showing that self-organization would be seriously impaired. No such showing is made in this case. There is no ground for the Board's finding that Stone's discharge was discriminatory, since the discharge resulted from the impartial application of petitioner's solicitation rule and was not motivated by hostility to the U. A. W.

II

Petitioner's decision to prohibit the wearing of U. A. W. steward buttons in its unorganized plant was based (1) upon its conviction that the condoning of the practice would give rise to the inference of some recognition by it of the U. A. W., and thus would constitute a violation of the neutrality toward employee organization affairs required by the Act, and (2) upon its apprehension that the appearance of employees purporting to hold the office of steward would raise, in the minds of supervisors and subordinate employees, question whether petitioner's established grievance procedure was being supplanted. The union steward is recognized in the labor relations field as being, among other things, the representative of labor in dealing with the employer, and his characteristic function is the adjustment with management of employee grievances. Petitioner freely permitted the wearing of other types of U. A. W. buttons, and there is no showing that the privilege of displaying the steward buttons would have legitimately aided the self-organization of the employees. The Board's failure to perform its required function of balancing the conflicting interests on this issue is underlined by its conclusion that the prohibition was a "curtailment" of the employees' right "to wear union insignia at work". In the circumstances of the case, this prohibition was reasonable as a matter of law.

ARGUMENT

I

Petitioner's no-solicitation rule, as applied to union solicitation in its factory or offices during non-working time, is reasonable and valid.

Without animus against unions, general or particular, petitioner had promulgated (in March 1941) and enforced a rule barring solicitation of any kind in its plant at any time; and in the course of impartial enforcement of the rule, petitioner (in January 1943) applied it without discrimination to an employee soliciting for his union during the lunch period. The Board does not complain of the reasonableness of the rule in general, but insists that, when applied to union solicitation in non-working time, it becomes "an unreasonable impediment to self-organization". We shall show: (A) that this general doctrine has been adopted by the Board and applied in this case in complete disregard of proper administrative procedure, that is, without any discernible consideration of, or fact-findings concerning, the important conflicting interests involved; and (B) that, absent any showing that petitioner's rule unduly interfered with self-organization, it is reasonable as a matter of law.

A

The Board's conclusion as to the solicitation rule is without support in the record, and rests on a policy formulated without due administrative procedure.

It is obvious that this issue involves, on the one hand, the public interest in employee self-organization for collective bargaining (Section 1 of the Act), and on the other hand, the public interest in uninterrupted production (particularly of vital war materials in time of war), in the efficient and economic operation of industry, and in the

safety and welfare of employees,[6] which latter public interest is paralleled in many respects by the private interest of the employer in efficient and safe operation. Since the paramount purpose of the Act is to eliminate obstructions to "the free flow of commerce" (Section 1), its protection of employee self-organization must plainly stop short of the point where it impairs this purpose. Indeed, the Board itself has recognized limits to such protection, holding that an employer may prohibit union solicitation during working hours.[7] The determination of how far union activity shall be protected calls for careful appraisal and balancing of the various interests above outlined.

The Board decisions evolving its doctrine respecting non-working time solicitation make no attempt to deal with

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6. Carroll R. Daugherty, *Labor Problems in American Industry* (5th Ed., Boston 1941), pp. 14, 15.

7. See for example, *Matter of Peyton Packing Co.*, 49 N. L. R. B. 828, 843-844 (1943).

8. *Matter of Denver Tent & Awning Co.*, 47 N. L. R. B. 586 (1943), enf'd *sub nom. National Labor Relations Board* v. *Denver Tent & Awning Co.*, 138 F. 2d 410 (C. C. A. 10, 1943); *Matter of United States Cartridge Co.*, 47 N. L. R. B. 896 (1943); *Matter of Carter Carburetor Corp.*, 48 N. L. R. B. 354 (1943), enf'd *sub nom. Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. 2d 714 (C. C. A. 8, 1944); *Matter of Piedmont Shirt Co.*, 49 N. L. R. B. 313 (1943), enf'd *sub nom. Piedmont Shirt Co.* v. *National Labor Relations Board*, 138 F. 2d 731 (C. C. A. 4, 1943); *Matter of Scullin Steel Co.*, 49 N. L. R. B. 405 (1943); *Matter of Peyton Packing Co.*, 49 N. L. R. B. 828 (1943), enf'd *sub nom. National Labor Relations Board* v. *Peyton Packing Co.*, 142 F. 2d 1009 (C. C. A. 5, 1944), cert. den. October 9, 1944.

None of these four Circuit Court of Appeals decisions supports the Board's general doctrine condemning rules against solicitation in non-working time. On the contrary, as shown *infra*, p. 26, the *Denver Tent*, *Carter Carburetor* and *Peyton Packing* decisions state that such rules are reasonable and lawful, if not adopted or applied with anti-union motive.

this basic problem. The Board's rationale is well exemplified in *Matter of Peyton Packing Co.*, 49 N. L. R. B. 828, 843-844, and may be fairly summarized as follows: Working time is for work, hence an employer may prohibit union solicitation during working hours; however, time outside working hours is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property, and therefore, the employer may not prohibit union solicitation on company property outside of working hours. Such superficial oversimplification of the problem wholly ignores the larger questions implicit in the case. Neither in the *Peyton Packing* case nor in any of the other decisions referred to, does the Board note any facts as to the relative importance to the employees of the privilege of soliciting inside the plant, nor does it seek to evaluate that privilege, nor does it consider the impact of the privilege upon that safety and efficiency in production in which the public and the employer alike have a vital interest. Failing any consideration of or findings on these questions, the decisions afford no basis for determining whether the Board has properly performed, or indeed whether it has discharged at all, its important function of striking a balance between the conflicting interests.

In the case at bar, the strong public interest, and petitioner's proper interest as well, in maintaining employee efficiency, safety and morale at the highest possible level, is self-evident. The proof shows that petitioner was engaged in vital war production; that its working force was expanding with great rapidity; that personal solicitation in myriad forms threatened employee harmony and efficiency; and that this threat could be met successfully only by prohibiting all personal solicitation *without exception* during both working and non-working time (*supra*, pp. 3-4). Against these considerations the Board advances no arguments, as Judge Swan points out in his dissenting

opinion below (R. 715); it merely dismisses them with the comment "the record discloses no special circumstances and [petitioner] advances no cogent reason, warranting extension of the prohibition to non-working time, when production and efficiency could not normally be affected by union activity"[9] (R. 689).

On the question of the benefit to the employees of the privilege of soliciting inside petitioner's plant, the Board's decision is wholly silent. The trial examiner's report does, however, contain this statement: "The evidence indicates that many of [petitioner's] employees live long distances from [petitioner's] plant and that their homes are scattered over a wide area"[10] (R. 638). Immediately after this "finding" the examiner sets out an excerpt from the testimony of Bobrow, which, being quoted out of its context, appears on its face to support the finding (*ibid*). However, a

9. Petitioner's handbook of regulations, indicates that the employees' lunch period, from the time work ceased until it recommenced, was of only 30 minutes duration; and that employees were required to leave the plant as promptly as possible at the end of their shifts and to remain away until the beginning of their shifts next following (Pet. Ex. 1, pp. 6-7, 18; R. 39). The amount of non-working time in the plant available to the employees was plainly very limited; and this fact underlines the strong probability that discord caused by solicitation during the abbreviated lunch period or just before the beginning of a shift would be "almost certain to invade working hours" (as Wilson, petitioner's Director of Industrial Relations, testified, R. 47). Furthermore, the expeditious and orderly handling of the entrance and exit of large groups of workers before and after shifts and during the lunch recess was of obvious importance to efficient plant operation, and disturbances in the limited periods of time available for these purposes would necessarily have a direct impact upon production efficiency.

10. The Board adopted "the findings, conclusions, and recommendations" of the examiner, with certain exceptions not related to this statement (R. 674).

reading of the full context[11] reveals that Bobrow was paraphrasing the reasoning of the "National Labor Board" (presumably the National War Labor Board) in a case involving an entirely different company (R. 194-195). Moreover, it is clear that Bobrow was testifying on direct examination in response to a question *as to what was said* at his meeting with Kress on January 26, 1944 (R. 189-198). The purpose of the testimony was not to prove facts about petitioner's plant or its employees, but merely to establish the substance of the conversation at the meeting; and petitioner did not cross-examine the witness regarding this statement. In unvarnished language, the "finding" of the examiner just above quoted was made without the slightest justification in the evidence. The examiner's subsequent conclusion that petitioner's plant was the place "uniquely appropriate and almost solely available" to the employees for self-organization purposes (R. 638), falls of its own weight.

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11. Bobrow's complete testimony on this point is as follows:

> I also pointed out that only a few short weeks prior to the time this conversation was being held a worker in Sperry Gyroscope Company had been fired for an almost identical reason, that of soliciting on company property, also on his own time, though.
>
> I pointed out to Mr. Kress and Mr. Lasker and Mr. Wilson that this worker was reinstated within a couple of weeks through a decision by the National Labor Board with full back pay and the decision found that he was within his rights first of all soliciting on his own time, but in addition to that that in these plants where transportation is particularly limited through gas rationing and transportation is made very difficult and workers come from a radius of anywhere from 10 to 50 miles to work every single day, it is reasonable to expect that the shop would be the natural place for workers to talk to one another and encourage one another to join the union.
>
> I pointed out to Mr. Kress that to the best of my knowledge this decision of the Labor Board was properly predicated on that principle (R. 194-195).

The Board offered no testimony in this case as to where or how far from the plant the employees lived, what means of transportation were available to them, what their social habits were, or what opportunities for association were afforded them outside the plant.[12] There is, in short, nothing on which the Board could base a finding as to the importance to the employees of the privilege of soliciting within the plant, and *a fortiori* there is no basis for the Board's award of priority between the conflicting interests.

The court below recognized that the Board here "did not take evidence upon the issue" of the competing priorities (R. 712-713); and with respect to three earlier Board decisions enunciating its doctrine,[13] the court said:

> We have examined these, but we cannot find in them any statement of the effects upon the employees of denying them the privilege of such [union] discussion, or upon the employer of granting it; *only a general conclusion that it is reasonable to allow the discussion to go on.* (R. 713). (Emphasis supplied)

The lower court erred, however, in holding (1) that the Board could substitute for evidence and findings its "general familiarity with the conditions of industry", and (2) that, since the record did not enable the court "to distinguish that part of the determination which lies within our powers of review—the appraisal of the conflicting interests and the award of priority between them—from that part which

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12. Although a number of petitioner's officials were called as witnesses either by the Board or by petitioner (these officials included Wilson, Director of Industrial Relations (R. 15); Lasker, Factory Manager (R. 374); MacDonald, Assistant Factory Manager (R. 412) and Kress, Assistant to the President (R. 540)); the Board made no attempt to elicit testimony from them concerning these matters.

13. *Matter of Denver Tent & Awning Co.*, 47 N. L. R. B. 586; *Matter of U. S. Cartridge Co.*, 47 N. L. R. B. 896; *Matter of Carter Carburetor Corp.*, 48 N. L. R. B. 354. See discussion *supra*, pp. 12-13.

is wholly the Board's—the ascertainment of the facts" (R. 713), the court was foreclosed from considering the question of law.

The effect of the court's decision is plainly to abdicate its traditional right of review, and to confer upon the Board power finally to determine questions of law by its *ipse dixit*, without a shred of evidentiary support. This is squarely contrary to the settled principles of judicial review of the action of administrative bodies such as the Board. Section 10(e) and (f) of the Act; *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 208 (1940); *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 597 (1941). If the courts uncritically accept the Board's general conclusions because they cannot tell how the Board reaches its result, the right of an aggrieved party to judicial review becomes wholly illusory.

This Court has lately demonstrated that it will not accept from an administrative body such a general conclusion which cannot be tested in the light of the record. In *Eastern-Central Motor Carriers Ass'n.* v. *United States*, 321 U. S. 194 (1944), the Interstate Commerce Commission had held a proposed "volume minimum" rate for motor carriers to be unreasonable and discriminatory, as a matter of policy which condemned all such rates in the absence of clear affirmative showing that they would operate at costs less than those incurred at reasonable "loading capacity" rates. The District Court affirmed the Commission's decision, holding that the extent to which the factor of competition should be recognized in arriving at just rates was a matter for the Commission's expert judgment. This Court reversed the Commission, saying that it could not tell from the record what effect the proposed rates would have upon competitive conditions,

> ". . . other than by sheer acceptance of the Commission's conclusion, in the form of its statement of the result and cryptic formulation of the policy on which it rested . . . (p. 209)

In conclusion, this Court said (pp. 211-212):

> In returning the case we emphasize that we do not question the Commission's authority to adopt and apply general policies appropriate to particular classes of cases, *so long as they are consistent with the statutory standards which govern its action and are formulated not only after due consideration of the factors involved but with sufficient explication to enable the parties and ourselves to understand, with a fair degree of assurance, why the Commission acts as it does.* Cf. *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 488, 489. . . . We only require that, whatever result be reached, enough be put of record to enable us to perform the limited task which is ours. [Emphasis supplied]

The analogy to the case at bar is very close. Here the Board, without "sufficient explication" to enable this Court and petitioner to understand why the Board "acts as it does", demands "sheer acceptance" of its conclusion (that prohibition of non-working time solicitation is an unreasonable impediment to self-organization), "in the form of its statement of the result and cryptic formulation of the policy on which it rested."

The court below suggests that, in dealing with this issue, the Board may draw upon its "general familiarity with the conditions of industry" (R. 713). No doubt the Board may in effect take judicial notice of matters "within its own peculiar province of inquiry"; but such facts must be noted in the record, since otherwise, no opportunity is afforded the opposite party to meet and rebut such evidence, and furthermore, to the argument that the finding of the Board was based on insufficient evidence it could always be answered that facts judicially noticed formed a sufficient basis for the finding. As said by this Court in *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.*, 227 U. S. 88 (1912), at pp. 93-94:

> . . . The Commission is an administrative body, and, even where it acts in a quasi-judicial capacity,

> is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding. *United States* v. *Baltimore & Ohio S. W. R. R.*, 226 U. S. 14.

See, to the same effect, *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292, 304-305 (1937); *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio*, 294 U. S. 63, 67-68 (1935); *United States and Interstate Commerce Commission* v. *Abilene & Southern Railway Co.*, 265 U. S. 274, 288 (1924); Faris, *Judicial Notice by Administrative Bodies*, 4 Indiana L. J. 167, 177-178; Note, *Judicial Notice by Administrative Tribunals*, 44 Yale L. J. 355, 356.[14] The lower court is entirely in error in indulging

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14. A significant excerpt from this Note (44 Yale L. J. 355, 356) is as follows:

> On the other hand, although they would not tamper with the nature of the proceedings before administrative tribunals, the courts must insist upon maintaining some measure of control over results. They must be able to step in for the avowed purpose of striking a proper balance between the conflicting desiderata of governmental efficiency and pro-

(Footnote continued on next page)

the presumption that, although the Board's conclusion has no record support, it must nevertheless be well-founded on general information revealed neither to the court nor to petitioner.

B

Petitioner's solicitation rule is valid as a matter of law.

As already noted (*supra*, pp. 11-12), the propriety of a rule such as petitioner's here should be determined by a careful appraisal and balancing of the various interests involved. The rule protects the public interest, and the employer's legitimate private interest, in the efficient and economic operation of the plant and the welfare and safety of the employees; it also impinges to some extent on employee self-organization, in which the public is likewise interested.

The general importance to self-organization of the privilege of solicitation inside the employer's plant may be tested in a number of ways. In the first place, if labor organizations themselves esteemed the privilege and believed its denial to be a serious impediment to their growth, it is natural to suppose that the issue would frequently

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tection of individual rights. The exercise of this appellate jurisdiction entails the necessity of a record which, if it is to enable the court to pass intelligently upon the administrative proceedings, must contain all of the facts considered by the administrative tribunal. To meet this requirement, some sort of restriction must be placed upon the doctrine of "judicial notice" by administrative tribunals, such as incorporation by reference into the record of all facts noticed; otherwise, to the argument that the finding of the board was based on insufficient evidence it could always be answered that facts judicially noticed formed a sufficient basis for the finding. Since much of the matter noticed by administrative tribunals would be matters of expert knowledge with which the courts are unfamiliar, it would seem necessary also to include in the record citation of the source material essential to determine the facts noticed, if proper review is to be assured.

appear in the historical development of the labor movement. However, save only in exceptional situations where employees were almost continuously on "company property" (as where the body of employees lived in a company-owned town, or aboard merchant vessels)[15] unions seem historically to have had little or no concern about the matter.[16]

Secondly, if the privilege is of consequence, it is unlikely that unions would deliberately contract it away. Yet many recent collective bargaining agreements—even some to

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15. In such exceptional cases it may well be that denial of the right of self-organization upon "company property" would seriously impair that right. See, e.g., *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206 (1940), enf'g *Matter of Waterman Steamship Corp.*, 7 N. L. R. B., 237 (1938); *National Labor Relations Board* v. *West Kentucky Coal Co.*, 116 F. 2d 816 (C. C. A. 6, 1940), enf'g *Matter of West Kentucky Coal Co.*, 10 N. L. R. B. 88 (1938); *Matter of Harlan Fuel Co.*, 8 N. L. R. B. 25 (1938).

National Labor Relations Board v. *Cities Service Oil Co.*, 122 F. 2d 149 (C. C. A. 2, 1941), involved the right of union representatives to passes enabling them to board respondents' ships in order to investigate grievances of the seamen. The court upheld the Board's requirement that passes be granted for this purpose, but declined to direct the granting of passes for the purpose of union solicitation. In its opinion below the court holds the *Cities Service* case irrelevant here, because it involved union agents not in the employ of the respondent employers (R. 712). We submit that this is a highly doubtful distinction; if the protection of the self-organizing right required ship-board solicitation, it might best have been effectuated through the leadership of trained outside organizers.

16. See generally, J. R. Commons and others, *History of Labor in the United States*, 4 Vols. (New York, 1918-1935), particularly Vols. II and IV. In Daugherty and others, *Economics of the Iron and Steel Industry* (New York 1937), Vol. II, pp. 991-994, a discussion of repressive measures used to resist unionization in the iron and steel industry makes no reference to the denial of the privilege of intra-plant solicitation.

which the U. A. W. has been a party—contain provisions barring all intra-plant solicitation.[17]

Thirdly, a study of the legislative history of the Act, including the various reports of the Congressional committees[18] and the Congressional debates,[19] discloses no evidence that Congress considered a denial of the privilege of intra-plant solicitation to be one of the numerous interferences with self-organization and collective bargaining against which the Act is directed, or indeed that Congress was in any way concerned with the allowing or denying of the privilege.

Finally, there has been no uniformity in dealing with the question either on the part of the National Labor Relations Board or of the National War Labor Board. The Labor Relations Board has upheld the validity of prohibitions against inside, non-working time solicitation in several cases;[20] and the War Labor Board has both approved[21]

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17. See Appendix B to this brief, containing examples of provisions forbidding intra-plant solicitation taken from collective agreements between employers and unions (including the U. A. W.); also *Collective Bargaining Contracts* (pub. by the Bureau of National Affairs, Inc., Washington, 1941), pp. 541, 220; Elias Lieberman, *The Collective Labor Agreement* (New York, 1939), p. 294; H. S. Roberts, *The Rubber Workers* (New York, 1944), p. 312; U. S. Dept. of Labor, Bureau of Labor Statistics, Bull. No. 716, pp. 5-6.

18. Senate Rep. No. 513, House Reps. Nos. 969, 972 and 1147, 74th Cong., 1st Session.

19. See, *passim*, Congressional Record, Vol. 79, Parts 3 and 6 (74th Cong., 1st Sess.).

20. *Matter of Nash-Kelvinator Corp.*, 18 N. L. R. B. 738, 743 (1939); *Matter of Bemis Bros. Bag Co.*, 28 N. L. R. B. 430, 440 (1940); *Matter of Marshall Field & Co.*, 34 N. L. R. B. 1, 11 (1941); but see cases discussed *supra*, pp. 12-13.

21. *Matter of J. I. Case Co.*, 10 L. R. R. Man. 1057, 1059 (1942).

and disapproved[22] trade agreements containing such prohibitions. Its disapproval occurred, it should be noted, in cases where the employees were already "organized", and the employer was engaged in collective bargaining with the union representing them. In this situation, of course, union solicitation is much less likely to create friction and disharmony than when the employees are unorganized, and these cases are clearly distinguishable from the case at bar.[23]

We submit that a consideration of these various factors impels the conclusion that the privilege of intra-plant solicitation, while no doubt of assistance in self-organization, is not, in the usual case, of particular significance in the protection of the employees' rights.

On the other hand, the permission of solicitation within the plant is obviously fraught with potential if not actual danger to employee harmony and safety and to efficient production. This is well stated in *Midland Steel Products Co. v. National Labor Relations Board*, 113 F. 2d 800 (C. C. A. 6, 1940), at 805-806:

> In modern industry the performance of work with efficiency and without physical danger depends not only upon the devotion of the employees to their

22. *Matter of General Chemical Co.*, 3 War. Lab. Rep. 387, 396 (1942); *Matter of Ohio Public Service Co.*, 7 War. Lab. Rep. 154, 156 (1943).

23. The War Labor Board has very recently found it necessary to limit non-working time solicitation even in an organized enterprise. In *Matter of American Telephone and Telegraph Co.*, 20 War Labor Rep. 201, 202 (November 28, 1944) the Board directed employer and union to agree that union solicitation outside of working time should be carried on only "in space where no company operations or administrative work is performed" and by groups of no more than eight employees, with the further proviso that solicitation "shall not interfere with the operations of the company or the use of the space by other employees for the purposes for which the space is intended".

> work, but also upon the amity with which they cooperate.
>
> * * * Solicitation, argument, the hurling of epithets in tense discussion before work has been commenced or in the noon hour, may reasonably be expected to carry a certain animus over into work hours.

Similarly, in *Le Tourneau Co. of Georgia* v. *National Labor Relations Board*, 143 F. 2d 67 (C. C. A. 5, 1944), cert. granted November 6, 1944, the court said (p. 68):

> Unfortunately organization efforts often produce excitement and feeling among the employees, even exhibitions of violence.

The effects of such disharmony and friction among the employees constitute, of course, an immediate danger not only to the employer's legitimate interest in efficient operation but also to the important public interest in uninterrupted production and the safety and welfare of the employees.

These disruptive and harmful results are much more likely to occur in an unorganized plant than in a plant where a union has established its right to majority representation of the employees. This is inevitable in the democratic process: during many of our political election campaigns, charges are hurled, epithets applied, and feeling runs high: neighbors, usually amicable, engage in angry and violent argument. When the election is past, the losers for the great part accept the decision of the majority, and the electorate settles down to normal existence. So it is in union organizational campaigns. The National War Labor Board has recognized this, saying in *Matter of Ohio Public Service Co.*, 7 War Labor Rep. 154 (1943) at 156:

> In the past, because of the question as to which of two organizations would represent the employees and whether or not some employees desired to have no labor organization, it is not surprising if there

> was friction between certain employees. At the present time, however, the union has been recognized as the sole agency for collective bargaining for the employees here involved. There is no reason to anticipate continuance of such animosities as have existed in the past.

The question whether union solicitation should be permitted in an organized plant is not presented in this case, since no majority representative had been chosen (R. 555).

When all these various considerations are duly weighed, we submit that the proper balancing of interests clearly justifies the barring of solicitation in a plant where no bargaining agent has been chosen,[24] unless in a particular case it can be shown that solicitation outside the plant is so difficult as seriously to impair the self-organizational right. Since no such showing is made in the instant case, petitioner's rule should be held valid as a matter of law.[25]

Thus far the question of the validity of rules similar to petitioner's has been considered in seven other cases by four different Circuit Courts of Appeals. In each case, the court has unanimously held or stated that such rules, if not adopted or applied with anti-union motive, are valid as a matter of law.

Square holdings to this effect are found in *Midland Steel Products Co.* v. *National Labor Relations Board*, 113 F. 2d 80, 805-806 (C. C. A. 6, 1940);[26] *Boeing Airplane Co.*

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24. Cf. S. M. Salny, *Independent Unions under the Wagner Act* (Boston, 1944), pp. 247-249, 280.

25. This is the view expressed by Judge Swan in his dissenting opinion below (R. 715).

26. The reasons for its decision in the *Midland Steel* case are well expounded by the court at pp. 805-806:

> We think the rule is clearly reasonable. The employer has the right on his premises to demand the single-minded attention of the employee to his work. In modern industry

(Footnote continued on next page)

v. *National Labor Relations Board*, 140 F. 2d 423, 435 (C. C. A. 10, 1944); *and LeTourneau Co. of Georgia* v. *National Labor Relations Board*, 143 F. 2d 67, 68 (C. C. A. 5, 1944), cert. granted November 6, 1944.[27] In *National Labor Relations Board* v. *Williamson-Dickie Mfg. Co.*, 130 F. 2d 260, 267-268 (C. C. A. 5, 1942) the validity of a similar rule was upheld by necessary implication, as the court below noted (R. 711). In each of three other cases— *National Labor Relations Board* v. *Denver Tent & Awning Co.*, 138 F. 2d 410, 411 (C. C. A. 10, 1943); *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. 2d 714, 716 (C. C. A. 8, 1944); and *National Labor Relations Board* v. *Peyton Packing Co.*, 142 F. 2d 1009 (C. C. A. 5, 1944), cert. den. October 9, 1944—the court sustained the Board's finding that the rule involved was adopted or applied for anti-union reasons; but in each case the court subscribed to the general proposition that such rules, in the absence of anti-union motive, are lawful.

Since petitioner's solicitation rule was reasonable and lawful and was adopted and applied without anti-union

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the performance of work with efficiency and without physical danger depends not only upon the devotion of the employees to their work, but also upon the amity with which they cooperate.

The right of the employer to make reasonable rules for the safety and efficiency of the work includes his right to make such rules for the entire time that the working force is on the employer's premises. Solicitation, argument, the hurling of epithets in tense discussion before work has been commenced or in the noon hour, may reasonably be expected to carry a certain animus over into work hours. If the rule against solicitation is reasonable, the fact that it applied to soliciting for union membership does not relieve the employee of his obligation of obedience.

27. This case has been set for argument before this Court immediately after the instant case.

animus, the discharge of Stone for breach of the rule was not violative of Section 8(1) or 8(3) of the Act.

However, irrespective of the validity of the rule, its application to Stone was not a violation of Section 8(3) of the Act. This section makes it an unfair labor practice for an employer—

> by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

The term "discrimination" in this context plainly means the making of a difference in treatment of one or more individuals as compared with others. See *Webster's New International Dictionary* (1929), p. 637. The "term or condition of employment" here involved is the rule against solicitation. The proof is clear that petitioner impartially enforced the rule both with respect to Stone and to all other employees (*supra*, pp. 3-4), and the Board reversed the examiner's finding that the rule had been discriminatorily applied to Stone (R. 690). The rule was invoked against union solicitation precisely as it was invoked against all other forms of solicitation. Hence the discharge of Stone did not constitute discrimination within the meaning of Section 8(3). Moreover, while the discharge obviously affected Stone's "tenure of employment", it did not do so in any discriminatory manner: the discharge resulted from the impartial enforcement of the rule, and was not in any way motivated by anti-union cause. The Board itself has said:

> The Board has never held it to be an unfair labor practice [under Section 8(3) of the Act] for an employer to hire or discharge, to promote, or demote, to transfer, lay-off or reinstate employees or their terms or conditions of employment, for asserted reasons of business, animosity, or because of sheer caprice, so

long as the employer's conduct is not wholly or in part motivated by antiunion cause.[28]

It is apparent that so much of the Board's order as requires petitioner to reinstate Stone with back pay (order, 2(a) and (b), R. 693) is premised upon the Board's finding of a violation of Section 8(3). Since no such violation can be established on this branch of the case irrespective of the determination as to the general validity of the solicitation rule, this part of the Board's order can not be sustained.

II

Since the U. A. W. had not been recognized, petitioner's prohibition against the wearing in its plant of U. A. W. steward buttons was reasonable and lawful.

The narrow issue presented is the propriety of petitioner's prohibition of the wearing of one particular type of U. A. W. insignia, the steward button or badge. The evidence is undisputed that petitioner had no objection to, and did not seek to regulate, the wearing of any other form of union button or badge (*supra*, pp. 5-6).

There is no controversy as to the facts already outlined (*supra*, pp. 5-6) relating to this issue. The U. A. W. had neither qualified nor asked for recognition as employee bargaining agent,[29] nor had it chartered a local at the plant.

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28. *Fourth Annual Report of the National Labor Relations Board* (Govt. Print. Off., 1940), p. 60; see to the same effect the Board's *Fifth Annual Report* (1941), p. 37, *Sixth Annual Report* (1942), p. 45, and *Seventh Annual Report* (1943), p. 46.

29. Through its regional director, the U. A. W. had requested minority representation for its members concerning grievances and working conditions (R. 609-610). To this the U. A. W. was not entitled, as the Board and the courts have held *Matter of Bailey Meter Co.*, 53 N. L. R. B. 706, (1943), 707; cf. 712; *Mooresville Cotton Mills* v. *National Labor Relations Board*, 94 F. 2d 61, 65 (C. C. A. 4, 1938).

The employees who wore the badge of steward received their title in most casual fashion, at the hands of a very small fraction of the entire body of workers; their function was to electioneer for the U. A. W., which did not differ materially from their previous function as members of the organizing committee. Petitioner, after due deliberation and advice from counsel, concluded that, by wearing the buttons, these employees appeared to be representing themselves not merely as U. A. W. functionaries, but as having management-recognized status in the plant;[30] and acquiescence in this representation, petitioner was convinced, constituted a probable violation of the neutrality required by the Act, and furthermore threatened to impair petitioner's established grievance procedure. In requesting the "stewards" to cease wearing their buttons, petitioner gave a full explanation of the reasons for its position; however, the employees deliberately refused obedience, doubtless to make a test case.

Petitioner's apprehension that under the circumstances the wearing of these buttons was a misrepresentation it could not properly ignore, was well-founded. The term "steward" or "shop steward" has acquired an established and definite meaning in the labor relations field. The steward is recognized as the representative of a labor organization and its employee members in their relations with the employer; he sees to the carrying out of provisions of collective bargaining agreements, and his typical and emphasized function is the adjustment with management of

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30 Special significance attached to the display of buttons or badges in petitioner's organization. Every employee was required, while in the plant, to wear a badge which (a) in the case of the ordinary employee, by its particular color identified the shop in which he worked, and (b) in the case of the supervisory employee, by its distinctive design denoted his degree of rank and authority in petitioner's hierarchy (R. 22-23, 36, 503).

employee grievances.[31] The steward also has intra-union tasks, such as the soliciting of new members and the collection of dues; but his characteristic duty, which distinguishes him from union workers and organizers in general, is that of dealing with management on behalf of the employees he represents. This characteristic function can, of course, attach to his office only when it has been accorded some form of management recognition.

The employees here involved were obviously not stewards in this sense. Irrespective of the right of the U. A. W., for its internal purposes, to give them any title it chose, in the plant and *vis-à-vis* management they were simply U. A. W. organizers.

Had petitioner condoned the misrepresentation by these employees of their status, with its obvious implication of some degree of acceptance of the U. A. W., rival labor organizations might well have complained.[32] The principle

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31. See e.g., U. S. Dept. of Labor, Bur. of Labor Statistics, Bull. No. 686, p. 144; also Bulls. Nos. 419, 448, 468, 716 (pp. 5-6); *Collective Bargaining Developments and Representative Union Agreements, Studies In Personnel Policy*, No. 60, pub. by National Industrial Conference Board (1944); Lieberman, *The Collective Labor Agreement* (New York, 1939), pp. 183 ff.; Salsy, *Independent Unions under the Wagner Act* (Boston, 1944), p. 292; *Matter of Arthur J. O'Leary and Son Co.*, 9 War Labor Rep. 421, 428 (1943); 8 L. R. R. Man. 1222, 1226, (1941) (agreement of June 15, 1939, between Allis-Chalmers Manufacturing Co. and the U. A. W.).

See also Appendix C to this brief, setting forth pertinent extracts from Government, union and other publications, relating to the functions of shop stewards.

32. The Board lays mistaken stress upon the absence of evidence that any employee had, in fact, been misled by the steward buttons. It has been uniformly held, in cases involving illegal assistance by employers to unions, that proof of the effect of the assistance upon individual employees is unnecessary; it is the evidencing of favor, whether directly or indirectly,

is well settled that an employer must treat with complete impartiality and neutrality the efforts of his employees to organize for collective bargaining purposes. *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 78 (1940); *National Labor Relations Board* v. *Cleveland-Cliffs Iron Co.*, 133 F. 2d 295, 301 (C. C. A. 6, 1943). The fact that no rivals had as yet openly appeared is irrelevant; petitioner was entitled to guard in advance against being caught in the union crossfire.[33]

Furthermore, the record shows that for many months prior to January 1943, petitioner had had in operation effective procedure for the adjustment of employee problems and grievances (R. 33-35, 555, 564, 576-578). The appearance of employees purporting to hold the office of steward—an office normally connoting active participation in grievance adjustment—was obviously calculated to raise, in the minds of supervisors and subordinate employees, question whether petitioner's established grievance pro-

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which offends the Act. *National Labor Relations Board* v. *John Engelhorn & Sons*, 134 F. 2d 553, 556 (C. C. A. 3, 1943); *National Labor Relations Board* v. *Aintree Corp.*, 132 F. 2d 469, 472 (C. C. A. 7, 1942); *Rapid Roller Co.* v. *National Labor Relations Board*, 126 F. 2d 452, 457 (C. C. A. 7, 1942); *Humble Oil & Refining Co.* v. *National Labor Relations Board*, 113 F. 2d 85, 92 (C. C. A. 5, 1940).

33. Subsequent to the hearing in this case, two other unions did seek representation of certain employees respectively at petitioner's Long Island plant and at its plant in Evansville, Indiana. In an election directed by the Board at the Long Island plant, Local Union No. 25, International Brotherhood of Electrical Workers, A. F. L. was placed on the ballot together with the U. A. W. *Matter of Republic Aviation Corporation*, etc., 54 N. L. R. B. 539 (1944). In the election directed at the Indiana plant, International Association of Machinists and the U. A. W. were both placed on the ballot. *Matter of Republic Aviation Corporation, Indiana Division*, etc., 51 N. L. R. B. 1287 (1943).

cedure was being supplanted or supplemented. The Board's comment that there is no specific evidence that "the appearance of union stewards affected the normal operation" of the grievance procedure, is in the face of Kress' undisputed testimony that "the wearing of shop steward buttons was confusing to our supervisory staff" (R. 554-555), and is in any case beside the mark. Petitioner was entitled to stop the misrepresentation before harm was done.

Basically, this issue required the Board to balance petitioner's interest in the orderly operation of its plant against the employees' interest in self-organization. We submit that on this record the balance is wholly in favor of petitioner: there is abundant evidence of potential harm to petitioner if the button wearing were permitted, and there is no proof at all that the prohibition was detrimental to the employees. The record leaves no doubt that the employees were free to wear any other type of U. A. W. button (R. 213, 241, 561-563), and there is no showing that the self-organization of the employees would have been legitimately aided by the wearing of the steward insignia. The Board, however, advances no real argument against petitioner's position, contenting itself with the observation that no harm had yet occurred, and holding merely that the prohibition was a "curtailment" of the employees' right "to wear union insignia at work" (R. 675-676). It is apparent that on this issue the Board has not intelligently appraised and balanced the conflicting interests, but—as in the case of the solicitation rule—has indulged, in "the cryptic formulation of its policy" (cf. *supra*, p. 18).

In the light of all the circumstances, petitioner's ban against the wearing of the steward buttons was wholly reasonable, and hence the discharge of the three employees for disobeying the ban—being otherwise not discriminatory—was not violative of Section 8(1) and (3) of the Act. The

lower court erred in failing to review the Board's determination of the issue, and in failing to hold the prohibition to be reasonable as a matter of law.

Conclusion

For the foregoing reasons, it is respectfully submitted that the decree below should be reversed.

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December 1944.

Appendix A

Statute Involved

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

SECTION 1.

* * * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

SEC. 7. Employees shall have the right to self-organization; to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

* * * * *

SEC. 10 (e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for

the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the district court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. . . . . The findings of the Board as to the facts, if supported by evidence, shall be conclusive. . . . The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended.

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . . . Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems [illegible]nd proper, and in like manner to make and enter [illegible]ecree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

Appendix B

Examples of Provisions Forbidding Intra-Plant Solicitation, taken from Collective Agreements between Employers and Unions (including the U. A. W.).

1. From agreement between Briggs Manufacturing Company, a Michigan Corporation, and Briggs Indiana Corporation, an Indiana Corporation, and International Union, United Automobile Workers of America, Locals Nos. 212 and 265 (CIO) June 7, 1939, 4 L. R. R. Man. 1022.

Article 1—*Recognition.*

Section 1. * * *

(b) The Union agrees that its representatives and members will not, on Company time or property, solicit membership in the Union and that its representatives and members will not intimidate or coerce employees in any manner or at any time.

* * * * * *

2. From agreement between Allis-Chalmers Manufacturing Co. and Allis-Chalmers Workers' Union, Local 248, United Automobile Workers of America (CIO), June 15, 1939, 8 L. R. R. Man. 1222, 1223.

Sec. 4. The Union agrees that neither the Union nor its members will intimidate or coerce employees, or solicit membership on Company premises, or conduct on Company premises any union activity other than that of collective bargaining and handling of grievances in the manner and to the extent hereinafter provided; provided, however, that the Company will, as mutually agreed upon from time to time, permit the Union to conduct upon Company premises activities other than those above designated, with the understanding that such activities will not cause any interference with the proper and orderly operation of the plant.

3. From agreement between Jones & Laughlin Steel Corp. (Pittsburgh and Aliquippa works and Pittsburgh

Warehouse) and Steel Workers Organizing Committee (CIO), April 1, 1941, U. S. Dept. of Labor, Bur. of Labor Statistics, Bull. No. 686, p. 294.

> Section 2. *Recognition*—The corporation recognizes the union as the exclusive collective-bargaining agency for all of its employees. The corporation recognizes and will not interfere with the right of its employees to become members of the union. There shall be no discrimination, interference, restraint, or coercion by the corporation or any of its agents against any members because of membership in the union. The union, its members, and agents agree not to intimidate or coerce employees into membership and also not to solicit membership on corporation time or plant property.

4. From agreement between Monroe Calculating Machine Co. and United Electrical, Radio and Machine Workers of America (CIO), July 14, 1942; printed in Company handbook.

> Article XI—*Bulletin Boards*
>
> Section 3. There shall be no distribution of letters, pamphlets, advertising matter, or tickets of any kind permitted on the Company's property, except by special permission of the Company in each individual case.

5. From agreement between American Viscose Corporation, Wilmington, Delaware, and Textile Workers Union of America (CIO), November 13, 1942; printed in Company handbook.

> Article I.
>
> Section J. The Union agrees that neither its members nor representatives of the Union will intimidate or coerce employees into joining the Union, and also agrees that its members will not solicit membership in the Union either on the Corporation's time or at their place of work.

6. From agreement between Timken Roller Bearing Co., Canton, Ohio, and United Steel Workers of America (CIO), February 19, 1943; printed in Company handbook.

Section II—*Recognition*

The Company recognizes the Union as the exclusive representative of the employees of the Company of this agreement for the purposes of collective bargaining, within the meaning and subject to the terms and provisions of the National Labor Relations Act. The Company recognizes and will not interfere with the right of its employees to become members of the Union. There shall be no discrimination, interference, restraint or coercion by the Company or any of its agents against any employees because of membership in the Union. The Union agrees not to intimidate or coerce employees into membership and not to solicit membership or collect dues on Company time or plant property.

7. From agreement between Kendall Mills, Oakland Plant, Newberry, S. C., and United Textile Workers of America, May 17, 1943; printed in Company handbook.

Section Eight—*Union Affairs*

The employer agrees that employees shall be wholly free to join the Union and participate in its affairs. The Union likewise agrees not to solicit membership within the mill and not to conduct Union affairs on Employer time, except as expressly provided for herein.

Union representatives may confer with the management and may handle departmental grievances on Employer time. In such cases both the aggrieved employees and the Union representatives shall obtain permission from their overseers to leave their work.

8. From agreement between The Texas Company, Port Arthur Works and Port Arthur Terminal Laboratories and United Laboratory Workers, July 11, 1944; printed in Company handbook.

Article XIII—*Miscellaneous*

Paragraph H. Solicitation for membership or collection of dues shall not be done on Company property or during working hours, nor will there be permitted on Company property or during working hours any activity which is an unfair labor practise within the meaning of the National Labor Relations Act.

Appendix C

Extracts from Government, Union and other Publications, Relating to the Functions of Shop Stewards.

I. From *Preparing a Steward's Manual*—Bull. No. 59, U. S. Dept. of Labor, Div. of Labor Standards; 1943.

pp. 4-6 THE STEWARD'S JOB

The steward is the cornerstone of the union.

As representative of the union in your plant, you, the steward, are the key man in the relationship of the union to management and the union to its members. Upon you depends, in large part, the success or failure of collective bargaining and the union organization in your plant.

Without you, and others like you, even the best contract is meaningless. You give it life; you make it work. The wisest union leader, the most efficient business agent cannot build the union, and make it function effectively without your help.

The union depends on you and your fellow-stewards for future leadership. The men and women who will represent labor in industry-wide conferences and at national policy-making conventions will come from the ranks of those who are today adjusting plant grievances and collecting union dues.

Management also depends on you for good industrial relations. Spokesmen for management have

said many times that a union steward who performs successfully the responsibilities with which he is entrusted is an asset to the company as well as to the men he represents.

You have, in general, two kinds of responsibilities. As spokesman for a group of workers you have the duty of enforcing the provisions of the contract as it affects them, of taking up their individual grievances with management and of carrying out the general policies of the union in all dealings with the company.

The other half of your job is to give leadership to the workers in making your organization as effective, democratic, and constructive as possible. You are the indispensable link between the members and the union office. You keep the union office informed of shop problems and the grievances of members. You keep the members informed of union activities and organization policies.

Representing the Workers to Management.

In representing the workers to management your main responsibility is to see that the provisions of the contract are observed. You can do this in a general way by comparing wages, hours, and other working conditions of the employees you represent with the conditions laid down in the contract. If something looks wrong to you, you will want to talk it over with the foreman and try to straighten out the situation immediately.

You probably won't have much trouble finding out about violations of the contract since the worker or workers affected will usually bring their grievances to you at the first opportunity. If you feel the complaint is justified it is your responsibility to take it up with the foreman. This is your first step in the grievance procedure. You will, of course, take pride in settling as many grievances as possible at this stage.

p. 8. Your Relationship with Supervision.

The importance of good relationship between the steward and the foreman cannot be overemphasized. *The foreman is the key man in the company's collective bargaining set-up just as you, the steward, are the key man in the union set-up. Between the two of you, you can largely determine the nature of labor relations in your department. It is you two—the steward and foreman—working together, who can make the union contract into a healthy cooperative undertaking which promotes morale and efficiency or let it become a bone of contention which helps no one.* (Emphasis supplied.)

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2. From *How to Win for the Union—A handbook for UAW-CIO Stewards and Committeemen*, pub. by International Education Dept., UAW-CIO, 6th Ed., February, 1943 (pp. 58-60).

CHECK LIST OF STEWARD'S DUTIES

ARE THESE JOBS BEING DONE IN YOUR PLANT?

He handles all grievances and strives to settle them in a peaceful manner to the satisfaction of the aggrieved worker.

He knows his department from top to bottom and checks abuses before they become chronic.

He knows his rights under the contract and the National Labor Relations Act.

He knows the contract well enough to catch infractions the minute they occur.

He keeps a written record of all grievances and their disposition.

He checks production rates to be sure they are the most productive ones over a long period, guarding against those that give flashes of high output but only lead to fatigue and inaccurate work in the long run.

He works for the elimination of all health and safety hazards in his department.

He announces all union meetings.

He keeps every worker in the department paid up and in good standing with the union.

He checks rumors and dissension by passing out reliable information on union activities and policies.

He is patient with sincere men who do not yet understand unionism.

He is wise enough to call upon the officers and executive board of his local for advice and assistance when major problems spring up in his department.

He knows where to secure reliable information on unemployment compensation, workmen's compensation, the National Labor Relations Act, and other legal questions.

He knows the operations, procedures and policies of the War Labor Board backward and forward.

He knows what conciliation services the government offers, and how to use them to best advantage.

He knows as much as, or more than the foreman about production methods.

He regards maximum war production in his shop as his primary concern, and works at all times to develop better productive methods in cooperation with his Labor-Management Production Drive Committee.

He works like a dog, but he and his kind are the salt of labor's earth.

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3. From *So You're A Steward!, a Handbook for TWUA Shop Stewards and Department Committees*, pub. by Education Dept., Textile Workers Union of America C.I.O., New York City (1943) (pp. 5-9).

As a shop steward, yours is the job and the opportunity to make this industrial democracy function. You represent your fellow workers in the shop. You are the non commissioned officers in the union army. As you carry out your duties effectively, you will represent your fellow unionists well, and the union will have value and meaning for them, and will flourish.

You are the representative of the union in the shop. It is within your power to turn a contract from a document of words and clauses into a living protection for the rights of workers. Without you, and others like you, even the best contract is meaningless. You put life in its veins, you make it work.

Because you are in the shop, in immediate contact with both worker and management, you become the basic foundation of the union. The wisest union leader, the most efficient business agent cannot build the union, and make it function effectively without your help. You must deal with management on all questions relating to conditions of work, while at the same time you keep the union strong within the shop so that the boss knows that you do represent the workers.

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KNOW YOUR CONTRACT

Let's look first at the steward's main tasks, his dealings with management. How can he best perform the job of seeing to it that the contract is lived up to in his department, that workers who have grievances can get them settled satisfactorily, and as rapidly as possible?

Obviously a shop steward who isn't completely familiar with the contract covering his plant will not be able to tell whether or not the company is living up to it. Unless he knows the contract provisions he'll not be able to properly advise a worker how to settle a complaint, much less discuss the matter with his foreman. So we might say that the first rule for shop stewards is: Know your contract.

The steward should read it over himself, and discuss it at shop stewards meetings, so that he is familiar enough with it to know how it applies to conditions which arise within the shop. A copy should always be kept close by for reference, for obviously, no one can be expected to memorize all of the clauses that go into a modern collective bargaining agreement.

KNOW YOUR DEPARTMENT

Then too, a steward who wants to be able to handle grievances intelligently must know his department. He must understand the operations as well, if not better than management. He should know which of the jobs are paid for by the hour and which by the piece. If an incentive bonus system is in effect, the

steward should know how it applies in his department. He should know something of expected and actual productions on the various jobs, and how the earnings run, in dollars and cents.

From his contacts in the department *the steward will also pick up much other information which will aid him in settling grievances.* He will know which workers are high producers, and which low, which machines are always getting out of order, while others run well.

IN CONCLUSION (p. 42)

So we've gone through the list of your duties as a shop steward. We have seen that you:

1. *Handle all grievances which arise in your department.*

2. Maintain sanitary and safe working conditions.

3. Maintain 100 per cent union membership in your department.

4. Get your workers to come to meetings, and otherwise educate them in union problems.

5. Serve as an invaluable link between the union officers and the members in the plant.

(Italics supplied).

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4. From *The Collective Labor Agreement*, Elias Lieberman (New York, 1939), p. 184.

The Shop Steward, Shop Secretary, and Shop Treasurer designated by the Union shall be recognized by the Company as representatives of its employees for the negotiation of all disputes and grievances arising during the life of this agreement, and they shall have the right to call in to negotiations officers of Local No. 13 or of the General Executive Board of the Union. (Hamilton Marine Contracting Co. and Industrial Union of Marine and Shipbuilding Workers of America)